Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001
01-600

GERALD MASON, Warden,
Petitioner,

vs.

CHARLIE LEE MITCHELL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

Federal Courts may not grant habeas relief by applying a new rule of law. Here, the Sixth Circuit found counsel's thirty-day suspension from the practice of law, ending on the eve of trial, and Respondent's uncorroborated allegations of inadequate consultation, to be a *per se* denial of counsel regardless of counsel's actual performance at trial, because the "pre-trial period" was a "critical stage" of the proceedings. Did the Sixth Circuit's decision apply a new rule of law?

II.

Cronic v United States rejected a "*per se*" or "categorical" approach to ineffective assistance of counsel claims, requiring courts to examine counsel's actual performance under *Strickland v Washington* in every case while observing in *dicta* that a "total deprivation" of counsel is presumed prejudicial. Here, defense counsel was suspended from practicing law for 30 days, but reinstated by the time of trial, and state courts rejected Respondent's claim of inadequate consultation as unsupported by the evidence. Did the Sixth Circuit correctly find the state court's evaluation of counsel's performance under *Strickland* to be an unreasonable application of this Court's decision in *Cronic*?

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ADDITIONAL REASONS FOR GRANTING THE WRIT

Respondent has filed an answer to the Petition in this matter raising three points, only one of which requires a detailed response.

A. Respondent's release from prison does not make this Petition moot — for either party.

Noting that the Michigan Department of Corrections released him from prison after holding him until his maximum discharge date, Respondent insists that this Court should decline to grant certiorari in this case on this basis, citing this Court's decision in *Spencer v Kemna*.[1] However, Respondent misreads this Court's holding in *Spencer* — which, ironically, actually serves to underscore the continuing controversy in this matter.

In *Spencer*, this Court took care to underscore that the petitioner's custody in prison at the time of filing a habeas sufficed to confer jurisdiction on the federal courts — and, in fact, noted that the "continuing collateral consequences" of a criminal conviction sufficed to maintain the action against a claim of mootness, so long as the petitioner was in custody at the time he filed the petition.[2] Among these "continuing collateral consequences" is a host of civil disabilities — including adverse affects on one's ability to vote, hold public office, or practice certain professions[3] — as well as liability

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[1] *Spencer v Kemna*, 523 US 1, 7 (1998).

[2] *Spencer v Kemna, supra* at 7-12; *see also, Sibron v New York*, 392 US 40, 44-45 (1968); *Carafass v LaVallee*, 391 US 234, 237-238 (1968).

[3] *See, eg, Carafass v LaVallee, supra*; Fiswick v United States, 329 US 211, 221-221 (1946); Ginsberg v New York, 390 US 629, 633 (1968).

to an enhanced sentence under a state recidivist statute.[4] However, where there are no collateral consequences — as, for example, to a contempt citation which carries no continuing or future civil disabilities — the case may become moot for purposes of a federal habeas action, since there is no longer any continuing harm to be redressed.[5] In *Spencer*, this Court noted that because the petitioner had not challenged the validity of his underlying conviction, his discharge from prison rendered his challenge to a *parole revocation* moot, since there appeared to be no continuing consequences to the fact that he had been ordered to return to prison.

In this case, by contrast, we see abundant reasons why this case remains important to both parties: from Respondent's perspective, among other things, a conviction for second-degree murder makes him ineligible to obtain a concealed weapons permit,[6] subjects him to criminal liability merely for possessing a firearm,[7] and makes him subject to enhanced

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In Michigan, a conviction for a violent felony — such as murder — is also grounds for disqualifying a citizen from obtaining a concealed weapons license. *See*, MCL §28.422.

[4] *See, eg, United States v Morgan*, 346 US 502 (1954). *Cf, Evitts v Lucey*, 469 US 387, 391 (1985).

In Michigan, the habitual offender statute imposes substantially enhanced penalities for repeat offenders. *See*, MCL §769.10-12.

[5] *Spencer v Kemna, supra* at 8; *see also, St Pierre v United States*, 319 US 41 (1943). *But see, Evitts v Lucey, supra; Benton v Maryland*, 395 US 784, 790-791 (1969).

[6] MCL §28.422.

[7] MCL §750.224f.

penalties if he commits other crimes in the future[8] — all of which are equally important to Petitioner, although for entirely different reasons. And from the standpoint of American jurisprudence, the Sixth Circuit ruling in this particular case is likely to impose severe consequences[9] — since it purports to expand the scope of habeas review nearly as much as it expands the parameters of the right to counsel from court proceedings and related matters to a vaguely-defined "pretrial period," for which counsel's actual performance is an entirely irrelevant concern. To put it bluntly, it would be rather an alarming state of affairs to permit the Sixth Circuit's decision in this case to stand, merely because the State could not keep Respondent in prison any longer.

Accordingly, the controversy at the heart of this case remains quite alive, and this Court should not permit itself to be distracted by Respondent's argument to the contrary.

B. The Sixth Circuit's decision violated the limitations of the habeas statute.

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[8] MCL §§769.10, 769.11, 769.12.

[9] In point of fact, until this Court acts to overturn the precedent of this case, it likely see the consequences first-hand in the near future. *See, eg, French v Jones*, ___ F3d ___ (CA 6, 2002) *cert pending sub nom Jones v French*, USSC #01-1413 (Applying *Cronic* to find *per se* denial of counsel where jury instructions found to be proper under state law are given on the record in the presence of a non-attorney whom defense counsel had represented to the trial court as co-counsel).

Petitioner's disagreement with the merits of the Sixth Circuit's decision is discussed in the Petition, and need not be repeated here.

Petitioner does, however, wish to note that Respondent has yet to cite a single precedent from this Court suggesting that an attorney's suspension from the practice of law for a partial period of time during the course of a lengthy representation, or details surrounding any pre-trial consultations between an attorney and client, can constitute a denial of counsel *per se*; explaining how this Court's decision in *Cronic v United States*[10] supports, rather than rejects, routine application of a "*per se*" standard; or why the Michigan Supreme Court's decision applying *Strickland v Washington*[11] and a host of other precedents to the facts of this case is any less reasonable than the Sixth Circuit's extraction of a "*per se*" rule from the dicta in *Cronic*.

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[10] *Cronic v United States,* 466 US 648 (1984).

[11] *Strickland v Washington*, 466 US 668 (1984).

CONCLUSION

WHEREFORE, this Court should grant certiorari in this matter.

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